IN THE

Supreme Court of the United States

OCTOBER TERM, 1942

No. 962

JOSEPH MESCALL,

Petitioner-Appellant,

vs.

W. T. GRANT COMPANY, A CORPORATION,

Respondent-Appellee.

BRIEF OF ELMER McCLAIN, AMICUS CURIAE

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Toledo, Ohio.

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I.

Summary Statement

The suit is one at law, in which appellant's underlying claim is that of impairment of his health, by reason of excessive working hours and exposure to varying temperatures, when an employee in the appellee's store in Ohio. The written opinion involved is that of the United States Circuit Court of Appeals for the Seventh Circuit, reported in 133 Fed. (2d) 209.

II.

Statement of Facts

Facts considered in this brief are those stated in the opinion, showing the State of the employment, the na-

ture of the work, the hours and temperatures and beginning illness and, more particularly, that the employment was in Ohio, continued for a six weeks period during cold weather with working hours from 7:30 A. M. to 11:00 P. M. except on Sundays, when they were from 9:00 A. M. to 4:00 P. M., and a variation of temperatures in the appellant's working place of 40 degrees—from 82° to 42°. At the end of six weeks and while the plaintiff was so working, he became ill.

The appellant relied on Section 871—15 Throckmorton's Ohio Code (Baldwin's 1936 Edition); 103 Ohio Laws, p. 99, Section 15, in support of his claim that the hours or temperatures constituted a violation of the appellee's duty to the appellant under the Ohio law.

For brevity that Section is hereinafter referred to as the "Ohio Act". It is quoted,

> "Employer required to protect the life, health and safety of employees.—Every employer shall furnish *employment* which shall be *safe* for the employees therein, and shall furnish a *place of employment* which shall be *safe* for the employees therein, and for frequenters thereof, and shall furnish and use safety devices and safeguards, and shall adopt and use methods and processes, follow and obey orders and *prescribe hours of labor* reasonably adequate to render such *employment* and places of employment safe, and *shall do every other thing* reasonably necessary to protect the life, *health, safety* and *welfare* of such employees and frequenters."—103 Ohio Laws, p. 99, Section 15. (Emphasis mine)

III.

Question Raised

The following important question arises upon the opinion: Does the opinion violate the rule of Erie Railroad Co. vs. Tompkins, 304 U. S. 64, in holding, as it does,

that the Ohio Law imposed no duty on the employer except to provide a safe place of work and that such duty was limited to eliminating defects in physical equipment?

The opinion conflicts with Erie Railroad Co. vs. Tompkins 304 U. S. 64 for the reasons shown in the appellant's petition for writ of certiorari and brief thereon and for the reasons herein following.

IV.

Reasons Relied On

The reasons supporting the claim of conflict are:

1. The Ohio Act provides that the employer shall furnish employment which shall be safe, as well as a place of employment that is safe; shall not only furnish and use safety devices and safeguards, but shall prescribe reasonable hours of labor and do everything reasonably necessary to render such employment safe and to protect the health and welfare as well as safety of the worker. The same statute provides that "welfare" shall mean and include "comfort," decency and moral well-being and that the term "safe" and "safety" as applied to any employment or place of employment "shall mean such freedom from danger to life, health or welfare of employees as the nature of the employment will reasonably permit, including requirements as to the hours of labor with relation to the health and welfare of employees." General Code Ohio, Section 871—13 (10) (11); 103 Ohio Laws, pp. 98, 99, Section 13 (10) (11).

2. The limitation of the Ohio Act to protection against defective equipment and to provision for mechanically safe place of work, is in conflict with the decision of the Ohio Supreme Court in Ohio Automatic Sprinkler Co. vs. Fender, 108 Ohio St. 149, 141 N. E. 269, 277 (3), which holds that the general courses of con-

duct prescribed in the Ohio Act, and similar acts, are lawful requirements; that the Act is of unmistakable meaning and that its purpose is to carry out the beneficent spirit of industrial legislation made possible by the adoption of the Ohio Constitution in 1912.

3. The power to enact laws for the general welfare and to fix or regulate hours of labor of employees is specifically provided by the Ohio Constitution Section 34, Article II and that power, it is provided by the same section, shall not be limited or impaired by any other provision of the Constitution. The Circuit Court of Appeals' opinion would withdraw from the legislature the power to enact laws, or nullify laws of general provision, requiring the employer to conserve health in carrying out his industrial enterprise and to protect the health, strength and vitality of the worker. Ohio Automatic Sprinkler Co. vs. Fender, 108 Ohio St. 149, 141 N. E. 269, 277.

4. The Ohio Law for protection of health and rights of workers has been subject to much litigation in which the Supreme Court of Ohio consistently, after first applying a narrow and restrictive rule of interpretation of the purpose of the law in favor of the employer, has reversed such cases and declared the broad purpose to conserve and protect employees in accord with the conception and beneficent spirit of modern industrial legislation. Ohio Automatic Sprinkler Co. vs. Fender, 108 Ohio St. 149, 141 N. E. 269, 277, and Triff vs. National Bronze & Aluminum Co. 135 Ohio St. 191, 20 N. E. (2d) 232, 235, 238, (leading unreversed cases in which prior, contrary decisions are expressly overruled).

V.

Importance of the Question

The importance of the question here involved is by no means limited to the particular controversy between the appellant and the appellee. If the opinion of the Circuit Court of Appeals in the cases is sustained, not only will the Ohio Act and the decisions giving effect to the broader spirit and purpose of industrial legislation be set back and undone, but much other legislation of similar kind imposing duties in general language in the interest of the worker will be nullified and the progress in legislative purpose in the last few years looking to the protection of the worker's welfare will suffer a severely adverse impact.

VI.

Argument

A. The Ohio law governed the duty of appellee as an employer, Erie Railroad Co. vs. Tompkins, 304 U. S. 64.

B. The Ohio Act is clear in its provision for regulation of hours and doing other things reasonably necessary for protection of health and welfare.

The Ohio Act is not a restatement of the common law, under which no duty arose to regulate hours or provide for welfare or comfort, but the employee exercised a volition in accepting employment and assumed the known risks. Ohio Automatic Sprinkler Co. vs. Fender, 108 Ohio St. 149; Hauer vs. French Bros. Bauer Co. 43 Ohio App. 333 (3); Lang vs. United States Reduction Co. (CCA 7) 110 Fed. (2d) 441, 442, 443.

C. The power of the Ohio legislature to enact laws prescribing a general course of conduct for regulation

of hours, and protection of health and welfare was a valid power under the Ohio Constitution and was exercised lawfully by the Ohio Act. Section 34, Article II Ohio Constitution. Ohio Automatic Sprinkler Co., 108 Ohio St. 149.

D. Subsequent amendment of Section 35, Article II of the Ohio Constitution which gave the Industrial Commission power to award additional or punitive compensation when injury arose by violation of a law creating a duty in specific language did not alter the power of the legislature to enact laws providing for general course of conduct by employer, under the dominant Section 34, Article II of the Ohio Constitution. State ex rel. Stuber vs. Industrial Commission of Ohio, 127 Ohio St. 325, 188 N. E. 526; Section 34, Article II Ohio Constitution.

For the reasons and on the facts stated herein, and regardless of any other facts stated in the opinion of the Circuit Court of Appeals or the ultimate result of the litigation between the parties, the question here presented is of vital concern to the worker in Ohio and many other states having enactments prescribing a general course of conduct for employers.

Respectfully,

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